Supreme Court, U.S.
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No. 91-1981

In The

Supreme Court of the United States

October Term, 1992

M/V TROPICANA, her engines, tackle, apparel, motors, furniture, etc., and GUINNESS MAHON & CO., LTD.,

Petitioners,

-against-

ESPIRITO SANTO BANK OF FLORIDA f/k/a BANK ESPIRITO SANTO,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATED QUESTIONS PRESENTED

The Petition for Writ of Certiorari actually presents the following questions:

1. Does the United States Supreme Court have jurisdiction to consider a Petition for Writ of Certiorari in an *in rem* admiralty action after disbursal pursuant to Final Judgment of letter-of-credit proceeds substituted for defendant vessel?

2. Absent any record evidence, may a party sustain *in rem* admiralty jurisdiction by asserting that proceeds of a Standby Letter of Credit substituted for a defendant vessel are a *res* in the collecting party's possession more than two years after collection pursuant to Final Judgment?

3. Do release of the defendant vessel and disbursal of the substituted *res* – *i.e.*, letter-of-credit proceeds – after Final Judgment terminate *in rem* jurisdiction under 28 U.S.C.A. § 1333?

LIST OF PARTIES

Pursuant to Supreme Court Rule 29.1, Respondent, Espirito Santo Bank of Florida, submits the following list of parties:

M/V "Tropicana", Petitioner;

Guinness Mahon & Co., Ltd., Petitioner;

Espirito Santo Bank of Florida, Respondent.

Principal non-voting stockholder of Espirito Santo Bank of Florida is Espirito Santo Financial Holding, S.A. Espirito Santo Bank of Florida has no subsidiaries which are not wholly owned.

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JURISDICTION

Naturally one would relish the opportunity to brief and argue in this Court. Nonetheless, this is neither the time nor the case. The Court lacks not only subject matter jurisdiction but also a subject – *i.e.*, the *res*.

The case considered by the district and circuit courts had been simply and solely an *in rem* admiralty action, originally filed pursuant to 28 U.S.C.A. § 1333. No party asserted – and no court considered – *in personam* claims. Upon filing of a Claim of Owner and posting of a Standby Letter of Credit as substitute *res*, the district court released M/V "Tropicana". After entry of Final Judgment, Espirito Santo Bank of Florida ("Espirito Santo") collected the substituted letter-of-credit proceeds in satisfaction of the vessel's obligation. Therefore, *in rem* admiralty jurisdiction under section 1333 terminated. *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362 (11 Cir. 1982) (*per curiam*), *cert. denied*, 460 U.S. 1012 (1983). *Accord, L.B. Harvey Marine, Inc. v. M/V "River Arc"*, 712 F.2d 458, 459 (11 Cir. 1983); *see Bank of New Orleans & Trust Co. v. Marine Credit Corp*, 583 F.2d 1063, 1068 (8 Cir. 1978).

In this case there has been no other basis for federal jurisdiction. Nevertheless, Petitioners attempted to appeal to the United States Court of Appeals for the Eleventh Circuit. Recognizing established limits of *in rem* admiralty jurisdiction, the Eleventh Circuit concluded that appellate jurisdiction under 28 U.S.C.A. § 1291 was non-existent and dismissed the appeal.

Absent subject matter jurisdiction, this Court cannot consider the Petition under 28 U.S.C.A. § 1254(1). Moreover, as to the admiralty action *sub judice*, there is no

conflict among United States courts of appeals on the same matter. Sup. Ct. R. 10(1)(a)(i). To the contrary civil forfeiture opinions cited by Petitioners have discusssed and distinguished traditional maritime decisions. *E.g., United States v. $95,945.18*, 913 F.2d 1106, 1109 n.2 (4 Cir. 1990).

STATEMENT OF CASE

Actually use of the plural "Petitioners" is a misnomer. The district court long ago released M/V "Tropicana", the sole named defendant *in rem*. The proceeds of an Irrevocable Standby Letter of Credit furnished in substitution for the vessel have been disbursed. Thus, Guinness Mahon & Co. Ltd. ("Guinness") is the only remaining party which might be a petitioner, if jurisdiction exists.

I. Proceedings Below.

After Espirito Santo filed its Complaint against M/V "Tropicana" *in rem*, Guinness served a Claim of Owner, expressly restricting its appearance to "the defense of [Espirito Santo's] claim and . . . not . . . an appearance for the purposes of any other claim with respect to which [*in rem*] process is not available or has not been served." R. 1-7-2[1]. The district court then entered an Agreed Order on Motion to Stay Execution of In Rem Process and for Substitution of Stipulated Security or Other Security in

[1] Record references are to the original Record on Appeal.

Lieu of M/V "Tropicana". The Order memoralized Guinness' agreement that "service on M/V 'Tropicana' pursuant to the Warrant of Arrest be, and the same is hereby, deemed perfected; and this Court has *in rem* jurisdiction over said vessel. . . . " R. 1-9-1. The court authorized Guinness to substitute a Standby Letter of Credit for the vessel and directed Guinness to file an Answer.

Subsequently Espirito Santo filed a Motion for Final Summary Judgment. Accompanying the Motion were a Statement of Undisputed Material Facts, Affidavits, a Notice of Intent to Rely on Deposition Testimony, and a supporting Memorandum. In its Final Order of Summary Judgment, the district court was impelled to comment:

> Claimant . . . did not object to Plaintiff's Statement of Undisputed Material Facts until after three months had elapsed from the time the Statement was filed. . . . We believe that we would be well justified in refusing to consider Claimant's exceedingly untimely submissions and in granting Plaintiff's Motion for Summary Judgment solely on the basis of the previously filed materials. Claimant has flagrantly disregarded the time limitations imposed by the Court pursuant to the Local Rules and the Federal Rules of Civil Procedure.

Appendix 14a. Giving Guinness the benefit of every doubt, however, the district judge examined the merits and found:

> Even upon consideration of Claimant's untimely objections, Claimant does not squarely dispute any material fact, as presented by Plaintiff, nor does Claimant bring to the attention of this Court any relevant factual issues which need to

> be resolved at trial. Indeed, we find no genuine dispute of material fact which would preclude entry of summary judgment.

Id. Ultimately the court determined that Espirito Santo's advances of funds "used to obtain undisputed, marine necessaries creates a maritime lien over Defendant vessel." *Id.* at 18a. The Final Order is reported at 1992 A.M.C. 1672-80.

On June 11, 1990, the district court entered Final Judgment in favor of Espirito Santo. Guinness filed Combined Motions to Alter or Amend Judgment, for Relief from Judgment, to Stay Execution and Issue Injunction, and for Security but did not seek an emergency hearing. Because Guinness posted no civil supersedeas bond, the Judgment became enforceable by execution on June 21, 1990. Eventually the issuer of the letter of credit disbursed sufficient proceeds to satisfy the Final Judgment. Espirito Santo then filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum, notifying the Court and all other parties that *in rem* jurisdiction had terminated.

In its Omnibus Order dated January 22, 1991, the district court denied all pending post-trial motions. *Appendix* 6a-8a. Termination of *in rem* jurisdiction after execution of the Final Judgment rendered pending motions moot. Guinness appealed.

The *per curiam* opinion of the United States Court of Appeals for the Eleventh Circuit, reprinted at pages 3a-4a of Petitioners' Appendix, reads:

> The appeal is dismissed for lack of jurisdiction. *Taylor v. Tracor Marine*, 683 F.2d 1361 (11th Cir.

> 1982) and *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir. 1988). If we had jurisdiction, we would affirm the judgment pursuant to our Local Rule 36-1.

Appendix 4a. Local Rule 36-1 of the United States Court of Appeals for the Eleventh Circuit provides in pertinent part:

> When the court determines that any of the following circumstances exist:
>
> . . .
>
> (d) summary judgment . . . is supported by the record;
>
> (e) judgment has been entered without an error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

11th Cir. R. 36-1.

II. Statement of Facts.

Early in 1988 ANK Marine Enterprises, Inc. ("ANK") purchased a cross-channel passenger ferry now known as M/V "Tropicana". The shipowner planned to refurbish the ship, then operate a one-day cruise service between Miami, Florida and Bimini. ANK entered into a long-term Cruiseship Charter Agreement with Sea Venture Maritime, S.A., a Panamanian corporation formed to act as charterer. In turn Sea Venture Maritime, S.A., signed an Agency Agreement with Sea Venture Cruises, Inc., a Delaware corporation based in Miami.

A. Espirito Santo.

Part of the vessel refurbishing involved manufacture and installation of galleys and related equipment, which are necessaries on cruise ships. Sea Venture Cruises, Inc., agent for the charterer and the vessel, executed an Agreement and an Amendment with Precetti, S.p.A., an Italian company, for manufacture and installation of galleys and appurtenant equipment. Sea Venture Cruises, Inc. agreed to make payments through letters of credit issued by Espirito Santo, a Florida banking corporation headquartered in Miami. The specific purpose of such letters of credit was to effect payment for materials, equipment, and labor furnished to M/V "Tropicana". Such payments would become due in stages, as Precetti, S.p.A. presented documents confirming that materials had been supplied and work had been performed for M/V "Tropicana". The persons who ordered such equipment had authority to contract on behalf of the vessel and her owner.

Pursuant to the letters of credit, Espirito Santo made payments totalling $988,888 for designated labor, materials, and equipment provided to M/V "Tropicana". All Espirito Santo letter-of-credit advances originated in its office in Miami after receipt of documents – described in and required by the letters of credit – which confirmed Precetti, S.p.A.'s work. Precetti, S.p.A. received the funds in Italy through correspondent bank transfers.

M/V "Tropicana" began Miami-Bimini service late in 1988. In February 1989 Sea Venture Cruises, Inc. executed a $100,000 Revolving Credit Note and a Revolving Credit Agreement with Espirito Santo. This revolving line of credit paid for necessary services and supplies provided

to M/V "Tropicana". Among recipients of such payments were a port agent, which sought reimbursement for vessel expenses; the vessel's stevedore; a provider of embarkation and other passenger services for the vessel; a provider of lodging for crewmembers; a provider of vessel-related insurance; and crewmembers and other personnel involved in vessel operation. Espirito Santo funded all payments for marine necessaries in Miami.

B. Guinness.

An English bank, Guinness made loans to ANK and received mortgages on M/V "Tropicana" in 1988. These loans were repaid on June 22, 1989. Guinness satisfied the vessel mortgages securing the 1988 loans, acknowledging receipt of all monies due.

Simultaneously Guinness and DNC Ship Mortgage International Bank made new loans to ANK. Pursuant to its loan arrangements, Guinness obtained new mortgages and also received all issued shares of ANK. The certificates represent bearer shares: there is no indication that any person or entity other than the possessor – Guinness – owns ANK.

On September 1, 1989, Guinness took possession of M/V "Tropicana". Guinness' subsequent Claim of Owner, read and verified by a duly authorized manager, stated in part that Guinness was "true and bonafide sole owner of the M/V 'Tropicana,' her engines, tackle, apparel, furniture, equipment, etc." R. 1-7-1. Whether or not Guinness ever was the actual owner, Guinness sold M/V "Tropicana" in October 1989.

SUMMARY OF ARGUMENT

In this *in rem* admiralty action, the district court long ago released M/V "Tropicana". Later Espirito Santo executed the Final Judgment by collecting proceeds of a Standby Letter of Credit substituted for the vessel. Collection of the letter-of-credit proceeds satisfied the Judgment, and no *res* remained. Therefore, jurisdiction under 28 U.S.C.A. § 1333 terminated, requiring dismissal of the case. No conflict between the Eleventh Circuit's jurisdictional ruling and opinions in other circuits exists.

Contrary to Petitioners' contention, a civil supersedeas bond remains prerequisite to retention of the substitute *res* and preservation of *in rem* admiralty jurisdiction throughout the federal judicial system; the bond is not "needless security" for purposes of appellate review. That Petitioners never posted the bond is inexplicable. Certainly they have neither a factual nor a legal premise for asserting that the *res* continues in existence, much less resides in the Southern District of Florida, for purposes of *in rem* jurisdiction under section 1333.

Petitioners' argument that the district court lacked maritime jurisdiction *ab initio* is not only self-defeating but also specious. Indisputably the nature and subject matter of the transactions involving Espirito Santo related to maritime commerce. Indeed, without the goods and services for which Espirito Santo paid, M/V "Tropicana" could not have functioned as a passenger vessel. Thus, the district court had *in rem* admiralty jurisdiction to evaluate and enforce Espirito Santo's maritime lien claims.

Under federal maritime law, particularly the Maritime Lien Act, the district court correctly ruled that

Espirito Santo was entitled to enforce its statutory maritime liens against M/V "Tropicana". Decided according to established principles of maritime law, the case *sub judice* has no national significance. In no sense can this controversy be equated with a civil forfeiture action, which utilizes certain admiralty rules of procedure but which has an independent statutory basis of jurisdiction. Deferring consideration of this Petition until the Court decides *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 932 F.2d 1433 (11 Cir. 1991), *cert. granted sub nom., Republic National Bank of Miami v. United States*, No. 91-767 (Oct. Term 1991), is unnecessary.

ARGUMENT

I. NO CONFLICT AMONG CIRCUITS AS TO ADMIRALTY *IN REM* JURISDICTIONAL REQUIREMENTS EXISTS.

Clearly the Petition attempts to create a chimerical conflict. The apparent purpose has been to reargue the merits of adverse decisions by the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit. Petitioners' position, however, is inherently paradoxical: On the one hand, Guinness has taken full advantage of admiralty rules prohibiting *in personam* claims against parties appearing as *in rem* "owners". *Petition* at 4. On the other hand, Guinness now demands that the Court deem Espirito Santo an *in personam* party.

Petitioners have cited no authority substantiating their assertions. Indeed, none exists; civil forfeiture

decisions discussed by Petitioners explicitly distinguish governmental seizures from admiralty actions such as the case *sub judice*. Nonetheless, Petitioners claim that "civil forfeiture cases control . . . because, by statute and court rule, civil forfeiture proceedings follow the *in rem* rules of admiralty". *Petition* at 9. In other words, the tail wags the dog from Petitioners' perspective.

Espirito Santo's admiralty action was exclusively *in rem*; M/V "Tropicana" was the only defendant. *See Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 22-23 (1960) (long-standing admiralty fiction that vessel assumed to be person for purpose of filing lawsuit and enforcing judgment). Section 1333 has been the sole statutory predicate for jurisdiction. Guinness agreed that "service on M/V 'Tropicana' pursuant to the Warrant of Arrest, be and the same is hereby, deemed perfected; and this Court has *in rem* jurisdiction over said vessel. . . . " *See Panaconti Shipping Co. v. M/V Ypapranti*, 865 F.2d 705, 707-08 (5 Cir. 1989) (*in rem* jurisdiction conferred by stipulation). M/V "Tropicana" then sailed, leaving an Irrevocable Standby Letter of Credit in her wake.

Having solved Guinness' enigmatic defenses as a matter of law, the district court entered Final Judgment in favor of Espirito Santo on June 11, 1990. Ten days later the Judgment became enforceable by execution. Fed. R. Civ. P. 62(a); *see United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1574 & n.2 (11 Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988). Rather than post a supersedeas bond, Guinness sought emergency relief from the appellate court. Even after the Eleventh Circuit summarily rejected its premature appeal, Guinness still did not post a supersedeas bond, "a privilege extended the judgment debtor

as a price of interdicting the validity of an order to pay money." *Poplar Grove Planting & Refinishing Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5 Cir. 1979). Consequently Espirito Santo remained free to execute the Judgment.

After the issuer disbursed the letter-of-credit proceeds satisfying the Final Judgment, the district court issued an Omnibus Order, confirming termination of *in rem* jurisdiction under section 1333. *A fortiori* an appellate court could not acquire jurisdiction pursuant to 28 U.S.C.A. § 1291. "It is hornbook law that no res being present, this court is without jurisdiction of the appeals. . . . " *Parks v. B.F. Leaman & Sons, Inc.*, 279 F.2d 529, 532 (5 Cir. 1960); *see Canal Steel Works, Inc. v. One Drag Line Dredge*, 48 F.2d 212, 213 (5 Cir.), *cert. denied*, 284 U.S. 647 (1931) (no subject matter upon which appellate court's judgment could operate). Here, moreover, Petitioners cannot contend that Espirito Santo's execution of the Judgment by collecting the letter-of-credit proceeds was surreptitious, accidental, fraudulent, or improper.

Nowhere in the Record is there a scintilla of evidence that the letter-of-credit proceeds remain identifiable, intact, and in the Southern District of Florida. Indeed, replying to a direct question during oral argument, Petitioners' counsel merely pointed out that Espirito Santo is located in Miami. He took the position that the judgment creditor's residence sufficed to preserve *in rem* jurisdiction. Manifestly the appellate panel deemed this response unsatisfactory.

Taylor v. Tracor Marine, Inc., supra, and its progeny bound the courts below. In *Taylor* the Eleventh Circuit stated:

> A trial court's *in rem* jurisdiction in a case such as this may be furnished by a vessel, the proceeds of the judicial sale of the vessel, or security furnished in lieu thereof. . . . However, when the res is no longer before the court, its *in rem* jurisdiction is destroyed and any appeal from its decision is rendered moot. . . . The latter rule is dispositive of this case.
>
> The appellants vigorously resisted the trial court's order to disburse all proceeds received from the sale of the M/V CIUDAD DE LEON, but they were unsuccessful at the trial court level and they did not seek extraordinary relief from this court to prevent disbursement. . . . Moreover, they did not file a supersedeas bond in order to obtain a stay upon appeal. The proceeds having been disbursed, any order which we might issue in this case would be an empty gesture. Consequently, this appeal is rendered moot. . . .

683 F.2d at 1362 (citations & footnotes omitted). *Accord, United States v. One Lear Jet Aircraft, supra,* 836 F.2d at 1573-74; *L.B. Harvey Marine, Inc. v. M/V "River Arc", supra,* 712 F.2d at 459. Factually and legally *Taylor* is in point and controlled disposition of the appeal.

Dismissing the appeal in *L.B. Harvey,* the Eleventh Circuit found *in rem* jurisdiction non-existent. *L.B. Harvey Marine, Inc. v. M/V "River Arc", supra,* 712 F.2d at 459. In response to an argument that failure to adjudicate the merits would be fundamentally unfair, the court reminded that a litigant, such as Guinness, must protect appellate jurisdiction in an *in rem* case. *Id.* Adhering to *Taylor* and *L.B. Harvey,* the *en banc* opinion in *Lear Jet* reiterated:

> The general rule of *in rem* jurisdiction is that the court's power derives entirely from its control over the defendant *res*. . . . Where an appellant fails to file a stay of judgment or a supersedeas bond and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction.

United States v. One Lear Jet Aircraft, supra, 836 F.2d at 1573 (citations omitted).

Cited by *Lear Jet* as well as *L.B. Harvey*, the Eighth Circuit's opinion in *Bank of New Orleans & Trust Co. v. Marine Credit Corp., supra*, was a precursor of *Taylor* in emphasizing that distribution of a substitute *res* destroys *in rem* jurisdiction. 583 F.2d at 1068. Moreover, the Eighth Circuit concluded:

> We know of no admiralty procedure or equitable principle which would warrant the exercise of in personam power against the Bank, to, in essence, recreate a substitute res in order to permit the adjudication of an ownership claim which could and should have been placed in issue in the district court in the normal course of in rem jurisdiction.

Id. at 1069.

Such clear precedent precludes jurisdiction *sub judice*. The letter-of-credit proceeds having been disbursed after entry of Final Judgment, *in rem* jurisdiction has become non-existent. If the issue had any relevance *sub judice*, Guinness cannot advise the Court where the proceeds now are or, indeed, whether they exist. Unlike the *res* in *United States v. One (1) 1983 Homemade Vessel Named "Barracuda"*, 858 F.2d 643 (11 Cir. 1988), the funds never had

and consequently cannot retain corporeal existence at the bottom of Biscayne Bay. Furthermore, in no sense can letter-of-credit proceeds disbursed pursuant to Final Judgment in an *in rem* admiralty action be equated with property involved in a statutory civil forfeiture case.

Whether or not Espirito Santo remains within the Southern District of Florida is immaterial. *E.g., Taylor v. Tracor Marine, Inc., supra,* 683 F.2d at 1362; *Bank of New Orleans & Trust Co. v. Marine Credit Corp., supra,* 583 F.2d at 1069. Here none of the parties, particularly Guinness, consented to *in personam* jurisdiction. *E.g., United States v. One Lear Jet Aircraft, supra,* 836 F.2d at 1576-77 (no consent to *in personam* jurisdiction by invoking *in rem* jurisdiction initially). A holding that the Court could acquire *in personam* jurisdiction over Espirito Santo "would be tantamount to deciding that a court has *in personam* jurisdiction over any participant in an *in rem* proceeding. This does not comport with the traditional analysis of *in rem* jurisdiction." *Id.* at 1577 (footnote omitted). There is no basis for *in personam* jurisdiction over a plaintiff which merely brings an *in rem* admiralty action or over maritime litigation which does not involve *in personam* claims. *Id.* at 1576 nn.5, 6; *Bank of New Orleans & Trust Co. v. Marine Credit Corp., supra,* 583 F.2d at 1069; *see Taylor v. Tracor Marine, Inc., supra,* 683 F.2d at 1362 n.2.

Petitioners' invitation to discover conflict among circuit courts by reference to statutory civil forfeiture cases is not well taken. Any disagreements upon which Guinness might rely pertain to "invocation of the *in rem* rule . . . to defeat jurisdiction in a government-initiated civil forfeiture action." *United States v. $95,945.18, supra,* 913 F.2d at 1109 (footnote omitted). The Fourth Circuit,

for example, refused to extend this maritime jurisdictional precept to dry-land controversies but noted that "[i]n so holding, we indicate no disapproval of the rule's applicability in other contexts, especially in admiralty. . . . " *Id.* at 1109 n.2.

Likewise, other opinions cited in the Petition do not deal with *in rem* admiralty jurisdiction. *E.g., United States v. Twelve Thousand Three Hundred Ninety Dollars ($12,390),* 956 F.2d 801 (8 Cir. 1992); *United States v. Certain Real & Personal Prop.*, 943 F.2d 1292 (11 Cir. 1991); *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428 (11 Cir. 1991) (*en banc*); *United States v. One Lot of $25,721.00 in Currency,* 938 F.2d 1417 (1 Cir. 1991); *United States v. $1,322,242.58,* 938 F.2d 433 (3 Cir. 1991); *United States v. $29,959.00 U.S. Currency,* 931 F.2d 549 (9 Cir. 1991); *United States v. Aiello,* 912 F.2d 4 (2 Cir. 1990), *cert. denied,* ___ U.S. ___, 111 S.Ct. 757 (1991); *United States v. Tit's Cocktail Lounge,* 873 F.2d 141 (7 Cir. 1989); *United States v. An Article of Drugs Consisting of 4,680 Pails,* 725 F.2d 976 (5 Cir. 1984). None involves an arrested vessel which might abscond from port but which substitutes a *res* – such as a letter of credit – in exchange for freedom to ply her trade during litigation; each pertains to seizure in a civil forfeiture proceeding. All focus on governmental transfers that ostensibly preclude appellate jurisdiction.

As indicated above, the conflict among circuits concerns extension of established maritime *in rem* jurisdictional restrictions to land-based civil forfeiture litigation initiated by the Government. Typical of rationales adopted to retain appellate juridiction is *United States v. $1,322,242.58, supra.* The Third Circuit concluded that the incorporeal *res* at issue was "merely an entry in a Justice

Department account with the United States Treasury", transferred from the Seized Asset Deposit Fund to the Asset Forfeiture Fund. 938 F.2d at 437-38. Underlying the courts' reasoning is a desire to examine alleged governmental impropriety in seizure and forfeiture of property, not to re-evaluate principles of maritime jurisprudence.

Having obtained an unsuperseded Judgment, Espirito Santo gained the unconditional right to execute: Espirito Santo had the power to acquire and dispose of the substituted *res* – which it did. Even if the original Standby Letter of Credit had been on deposit in the district court registry, Espirito Santo would have collected pursuant to the Final Judgment. Surely Petitioners must inform this Court that the Standby Letter of Credit imposed no obligation to retain proceeds collected pursuant to the Final Judgment. Moreover, assuming *arguendo* that the fact could become relevant, Petitioners must advise the Court that there is no basis for the statement that Espirito Santo "still holds the *res* as part of its assets". *Petition* at 15. Once Espirito Santo satisfied the Judgment, *in rem* admiralty jurisdiction terminated.

No "draconian" machinations are necessary to dispose of Petitioners' suppositions. *E.g., Taylor v. Tracor Marine Inc., supra.* This Court cannot countenance their effort to eradicate the clear demarcation between *in rem* and *in personam* admiralty jurisdiction. Having used the *in rem* cloak as a shield against any *in personam* claims by Espirito Santo, Guinness' current position is particularly unconscionable.

II. ADVANCES FOR MARINE NECESSARIES AFFORDED MARITIME LIENS ENFORCEABLE AGAINST M/V "TROPICANA" *IN REM.*

Manifestly the Eleventh Circuit not only analyzed Petitioners' arguments as to jurisdiction but also evaluated their contentions concerning the merits. An appellate panel comprised of judges having extensive admiralty experience concluded that, if subject matter jurisdiction had existed on appeal, summary affirmance without opinion would have been appropriate. The Eleventh Circuit repudiated the notion that the district court lacked jurisdiction *ab initio*. Nevertheless, Petitioners continue their thinly veiled attempt to resurrect factual and legal arguments twice rejected below.

This challenge to Espirito Santo's maritime liens remain fatally flawed on jurisdictional grounds. Moreover, in their zeal to acquaint the Court with their antediluvian version of maritime lien law, Petitioners ignore longstanding, comprehensive precedent. Finally in the factual and procedural context *sub judice*, the Petition proffers not even the pretext of conflict among circuits.

Unquestionably Espirito Santo's payments for necessaries furnished to M/V "Tropicana" were within the admiralty jurisdiction and engendered maritime liens. The Fifth Circuit has said:

> The term "necessary" under the [Federal Maritime Lien Act] includes most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function. *Necessaries are things that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged.* . . .

> *These "things" may be money,* labor and skill, and personal services as well as materials. . . . What is a "necessary" is to be determined relative to the requirements of the ship.

Equilease Corp. v. M/V Sampson, 793 F.2d 598, 603 (5 Cir.) (*en banc*) (citations omitted) (emphasis added), *cert. denied*, 479 U.S. 984 (1986); *see Farrell Ocean Services, Inc. v. United States*, 681 F.2d 91, 92 (1 Cir. 1982).

Advances of funds to facilitate purchase of goods and services for the vessel or to discharge maritime lien claims are "necessaries". *See Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 805 F.2d 42, 45 (1 Cir. 1986); *General Electric Credit & Leasing Corp. v. Drill Ship Mission Exploration*, 668 F.2d 811, 813-14 (5 Cir. 1982); *International Paint Co. v. M/V Mission Viking*, 637 F.2d 382, 385-86 (5 Cir. 1981); *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1207 (5 Cir. 1978); *Universal Shipping, Inc. v. Panamanian Flag Barge*, 563 F.2d 483, 484 (1 Cir. 1976); *Crustacean Transportation Corp. v. Atalanta Trading Corp.*, 369 F.2d 656, 660 (5 Cir. 1966); *Pavlis v. Jackson*, 131 F.2d 362, 365 (5 Cir. 1942), *cert. denied*, 318 U.S. 769 (1943). To acquire a maritime lien, a lienor, such as Espirito Santo, need not deliver funds to the vessel. *See Equilease v. M/V Sampson, supra*, 793 F.2d at 603; *Crustacean Transportation Corp. v. Atalanta Trading Corp., supra*. Under 46 U.S.C.A. § 31342(3) Espirito Santo "is not required to allege or prove in the action that credit was given to the vessel." Section 31342, like its predecessor, affords a presumption that one providing marine necessaries to a vessel acquires a maritime lien. *S.E.L. Maduro (Florida), Inc. v. M/V Antonio De Gastaneta*, 833 F.2d 1477, 1482 n.4 (11 Cir. 1987). The presumption is "very strong" that a provider of necessaries

looks to the credit of the vessel, not merely to the owner or charterer. *Sasportes v. M/V Sol de Copacabana, supra,* 581 F.2d at 1209; *see TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta,* 696 F.2d 1135, 1139 (5 Cir. 1983); *Gulf Trading & Transportation Co. v. M/V Hoegh Shield,* 658 F.2d 363, 368 (5 Cir. 1981), *cert. denied,* 457 U.S. 1119 (1982); *Inland Credit Corp. v. M/T Bow Egret,* 552 F.2d 1148, 1152 (5 Cir. 1977). The lien attaches when necessaries are supplied. *Belcher Co. of Alabama v. M/V Maratha Mariner,* 724 F.2d 1161, 1163 (5 Cir. 1984).

That Espirito Santo initially might have expected payment from the owner or operator of M/V "Tropicana" does not diminish or destroy its maritime liens. *Stevens Technical Services, Inc. v. United States,* 913 F.2d 1521, 1536 (11 Cir. 1990). *Accord, Marine Coatings of Alabama, Inc. v. United States,* 932 F.2d 1370, 1376-77 (11 Cir. 1991); *see Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co.,* 261 F.2d 862, 867 (5 Cir. 1958). "[A]n action on a shipowner's promise to pay the debt of the vessel is different from an action against the vessel to recover the value of services rendered. The potential liabilities are separate and distinct." *S.E.L. Maduro (Florida), Inc. v. M/V Antonio de Gastaneta, supra,* 833 F.2d at 1482. To overcome the "very strong" presumption and establish waiver of a maritime lien, a shipowner must prove that the lienor took affirmative action demonstrating deliberate intent to forego this valuable privilege and to rely solely on the personal credit of a person or entity other than the vessel. *Gulf Oil Trading Co. v. M/V Caribe Mar,* 757 F.2d 743, 750 (5 Cir. 1985); *Farrell Ocean Services, Inc. v. United States, supra,* 681 F.2d at 93-94.

Citing *Thorsteinsson v. M/V Drangur*, 891 F.2d 1546, 1551 (11 Cir. 1990), and *Sasportes v. M/V Sol de Copacabana*, *supra*, the district court held:

> It is firmly established that a foreign preferred ship mortgage is outranked by any maritime lien for repairs or other necessaries performed or supplied in the United States. . . . It is undisputed that the funds provided by the Plaintiff, giving rise to a maritime lien, originated and were advanced in the United States. Consequently, Plaintiff's maritime lien has priority over Claimant's preferred mortgage lien.

Appendix 19a (citations & footnote omitted). In *Swedish Telecom Radio v. M/V Discovery I*, 712 F. Supp. 1542 (S.D. Fla. 1988), a decision upon which Petitioners rely, the court pointed out that the primary concern of the Maritime Lien Act is protection of American suppliers. *Id.* at 1545. The district judge said that "this Court would have no difficulty finding a maritime lien in favor of an American supplier who supplied goods in a foreign port." *Id.* at 1548.

Indisputably Espirito Santo's specific letter-of-credit and line-of-credit payments were for marine necessaries furnished to M/V "Tropicana". Among such necessaries were galleys and galley equipment, crew wages and lodging, vessel insurance, stevedoring, passenger embarkation services, and supplies. The owner, charterer, and operator, as well as their agents, had not only presumptive but also actual authority to procure advances, which themselves become necessaries. *See* 46 U.S.C.A. § 31341, formerly 46 U.S.C.A. §§ 972, 973. Having produced unrebutted evidence as to disposition of such funds, Espirito

Santo had the right to enforce its maritime liens against the vessel. Manifestly both trial and appellate courts rejected Petitioners' jurisdictional and substantive defenses to Espirito Santo's liens.

In the context of this case, Petitioners' persistence in invoking the preliminary contract doctrine – ostensibly as a matter of law – in the Eleventh Circuit and in this Court defies understanding. The ink is hardly dry on *Exxon Corp. v. Central Gulf Lines, Inc.*, ___ U.S. ___, 111 S.Ct. 2071 (1991), in which this Court reviewed denial of admiralty jurisdiction over a claim brought by a charterer's agent to recover payments to a foreign fuel supplier. Analyzing and overruling *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), the Court found *Minturn*'s approach "inconsistent with the principle that the 'nature and subject-matter' of the contract at issue should be the crucial consideration in assessing admiralty jurisdiction." 111 S.Ct. at 2076, *quoting Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 26 (1871). "[A]dmiralty jurisdiction is designed to protect maritime commerce." 111 S.Ct. at 2076. The Court observed:

> While the Minturn Court viewed it as irrelevant "[t]hat the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies," the trend in modern admiralty case law, by contrast, is to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime. . . .

Id. (citations omitted).

Examining Exxon's claim, the Court discerned no real difference between actual delivery of fuel to the vessel

and payment to a third party for delivery of fuel to the vessel: the subject matter of both claims "is the value of the fuel received by the ship." *Id.* at 2077. "Because the nature and subject-matter of the two transactions are the same as they relate to maritime commerce, if admiralty jurisdiction extends to one, it must extend to the other." *Id.* at 2077 (citations omitted). *Exxon* did not expressly rule on the validity of the preliminary contract doctrine, now advanced by Petitioners. However, in agency situations the Court "emphasize[d] that courts should focus on the nature of the services performed by the agent in determining whether an agency contract is a maritime contract." *Id.* at 2077 n.7.

In the district court, Guinness candidly conceded that galleys are necessaries: without galleys M/V "Tropicana" could not have carried passengers. As Guinness also effectively admitted, payment for such marine necessaries became essential. Likewise, Petitioners must acknowledge, as a matter of law, that payments for other statutorily and judicially defined necessaries were essential to operate the vessel. Otherwise, "there can be no voyage." *Nehring v. Steamship M/V Point Vail*, 901 F.2d 1044, 1049 (11 Cir. 1990), *quoting Ingersoll Milling Machine Co. v. M/T Bodena*, 829 F.2d 299, 301 (2 Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). Lacking the goods and services for which Espirito Santo paid, M/V "Tropicana" could not have functioned in maritime commerce.

Whatever vitality may remain in the preliminary contract doctrine after *Exxon*, Espirito Santo's proven claims were specifically maritime. Needless to say, Petitioners' contention that Espirito Santo's letter-of-credit advances to pay for marine necessaries "were routine financial

services customarily provided by banks to their customers" [*Petition* at 18-19] strained the trial and appellate courts' credulity and ignores *Exxon*. Their allegations as to the nature and purpose of Espirito Santo's line-of-credit advances also contravene the Record established in the lower courts.

Guinness' reference to *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660 (11 Cir. 1987), is curious. Legally and factually, *E.S. Binnings* has no bearing on this case. Indeed, to hold that a general agency agreement was not a maritime contract, the Eleventh Circuit relied on "the [*Minturn*] rule". *Id.* at 665 n.4. Later *Exxon* overruled *Minturn*, which was *E.S. Binnings'* underpinning. In the case *sub judice*, no one ever alleged that Espirito Santo has been a party to any general agency agreement. Further, Binnings' action *in rem* was for commissions; it "did not include any claim for advances, costs or fees." *Id.* at 662. Espirito Santo's claims expressly concerned advances for marine necessaries furnished to M/V "Tropicana"; [s]pecial agents traditionally have been given a maritime lien for advances. . . . " *Id.* at 667 n.7.

While *E.S. Binnings* awaits careful review in the wake of *Exxon*, this is not the appropriate case. Cognizant of *E.S. Binnings*, the Eleventh Circuit rejected Petitioners' arguments. *E.S. Binnings* would have concurred that Espirito Santo's maritime lien claims predicated on payments for marine necessaries substantiate *in rem* admiralty jurisdiction.

III. CONSIDERATION OF THE PETITION IN THIS *IN REM* ADMIRALTY CASE DOES NOT DEPEND ON THE COURT'S RULING IN CIVIL FORFEITURE CASES.

As stated above, civil forfeiture cases and admiralty actions are separate and distinct. While both involve *in rem* claims, they arise from separate statutory jurisdictional bases. That civil forfeiture proceedings utilize Supplemental Rules for Certain Admiralty and Maritime Claims has no relevance to the issues in this case. Petitioners have not challenged the constitutionality and applicability of such Rules.

Contrary to Petitioners' claims, the Court's answer to the question posed in *Republic National Bank of Miami v. United States*, No. 91-767 (Oct. Term 1991) – "Whether a stay or supersedeas bond is necessary to preserve appellate jurisdiction in a civil forfeiture case?" – can have no impact on appellate jurisdictional requirements in a traditional admiralty action. Indeed, decisions which have refused to enforce the *in rem* rule and to decline appellate jurisdiction in government-initiated civil forfeiture proceedings have carefully explained their rationales. Perceived needs to review the propriety of governmental probable-cause determinations in taking and forfeiting property underlies several opinions which have upheld appellate jurisdiction. That this departure from established *in rem* jurisdictional precepts is confined to civil forfeiture cases has become clear. For instance, as stated above, the Fourth Circuit refused to impose the *in rem* rule on appeal in a civil forfeiture proceeding but noted that "[i]n so holding, we indicate no disapproval of the

rule's applicability in other contexts, especially in admiralty. . . . " *United States v. $95,945.18, supra,* 913 F.2d at 1109 n.2.

Petitioners have referred to no appellate decision repudiating *in rem* jurisdictional requirements in an action filed pursuant to 28 U.S.C.A. § 1333. Here maritime *in rem* jurisdictional precepts must govern. Undeniably Espirito Santo's execution of the Final Judgment was purposeful and proper. Petitioners clearly had ample time to stay execution and post a supersedeas bond. Nevertheless, Petitioners abandoned the normal course, which would have preserved *in rem* admiralty jurisdiction on appeal. That such jurisdiction no longer exists is the consequence of Petitioners' considered choice, not any error by the courts below. Therefore, denial of this Petition need not await any ruling as to appellate jurisdictional requirements in civil forfeiture cases.

CONCLUSION

Respondent, Espirito Santo Bank of Florida, respectfully submits that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit is unfounded. For the reasons stated above, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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